1995

State of Utah v. Roy Wirth : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. ROY WIRTH, Defendant/Appellant.	Case No. 950039 CA Priority No: 2

REPLY BRIEF OF APPELLANT

AN APPEAL FROM ORDER DENYING MOTION TO SUPPRESS
EVIDENCE FROM THE SECOND DISTRICT COURT FOR DAVIS COUNTY
The Honorable Rodney S. Page Presiding

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Oral Argument Requested

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POINT I

The fourth amendment limits a warrantless search incident to a lawful arrest where necessary to protect the safety of police and the public, and to prevent the destruction of evidence.

Defendant does not challenge the State's contention that a search incident to a lawful arrest is one exception to the fourth amendment's warrant requirement. Br. of Appellee at 5. Defendant does, however, challenge the State's failure to acknowledge the strictly defined and enforced limitations to the exception required by the Fourth Amendment to the United States Constitution.

In State v. Harris, 671 P.2d 175 (Utah 1983), a sheriff's deputy responded to a report by the defendant's neighbor that the defendant was growing marijuana plants on his property. The neighbor pointed out the direction of the garden, as well as the area where the defendant was hoeing the garden at the time. The deputy drove his car onto the defendant's property and walked into the backyard where he was met by the defendant. The deputy stated that he was there to check out a complaint, and asked whether it was true that the defendant was growing marijuana. When the deputy asked if he could see the plants, the defendant asked him to leave his property. The deputy responded that he could see the marijuana plants from where he was standing, and he returned to his car and called for a detective. After the detective arrived the decision

was made to proceed without a warrant. The defendant was placed under arrest, handcuffed, and the plants were seized. The defendant appealed his conviction for Production of a Controlled Substance, a third degree felony under Utah Code Ann., 1953, § 58-37-8 (l)(a)(i), on the ground that incriminating evidence against him was obtained in an illegal search by police officers in violation of the Fourth Amendment to the United States Constitution.

The question on appeal was whether or not the observations made by the police officers were lawful, and if they were, whether they justified the warrantless seizure. The Court concluded that they were not, and that the seizure was unlawful. The defendant's principal contention was that the officers uninvited entry on his property to search for marijuana constituted an unlawful search and seizure.

The State relies on the Court's decision in Harris for the proposition that a warrantless search is permissible for the limited purposes of preventing the arrestee from gaining control over a weapon or from destroying evidence of a crime. Id. at 180; Chimel v. California, 395 U.S. 752, 763 (1969). Neither exigency existed in Harris and consequently the Court found the seizure of marijuana plants taken from the defendant's property improper. Appellant expands on Harris because the decision is significant for its reiteration of the interests the fourth amendment seeks to protect and the devices in place to safeguard those interests. The Court in Harris quoted from the U.S. Supreme Court in Chimel v. California:

> [The makers of our Constitution] conferred, as against the government, the right to be left alone--the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding.

Id. at 178, citing Chimel v. California, 395 U.S. 752, 23 L.Ed 2d 685, 89 S.Ct. 2034 (1969).

Those privacy interests and the need to protect against well-meaning zealous men are not absolute however:

> There are justifiable intrusions when the right to be let alone must yield to the right of search... but as a rule that justification must be sanctioned by a judicial officer and not asserted in the discretion of a government official, because "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well delineated exceptions." The burden is on those seeking exemption to show the need. Prior review avoids the familiar shortcomings of hindsight judgment that may, in close cases, lead courts acting after the fact to rule against apparently guilty defendants. The intervention of a neutral magistrate not only guarantees a lawful search of a suspected offender, but in a larger sense it protects society against the erosion of those cherished rights that are still not taken for granted in many parts of the world. Courts do not enforce these procedural requirements to sanction the activities of one single individual, but to assure all citizens those continuing fundamental rights.

State v. Harris, 671 P.2d 175 (Utah 1983) (citations omitted). Chimel states the search warrant requirement in no uncertain terms:

> Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals Id at 693.

Our courts clearly hold individual privacy out to be a most valued right. An unjustified intrusion into an individual's privacy is deemed a violation of the fourth amendment and absent one of the well-delineated exigencies, justified intrusions must be sanctioned by a neutral magistrate. One such exigency is a limited search incident to a lawful arrest. This exigency is a strictly limited right and requires something more than a mere arrest. The safety of police and the public, and the destruction of evidence may justify a limited search of the area within the arrestee's immediate control. The State bears the burden to show by a preponderance of the evidence that the safety of the police or public was at risk, or that evidence would be destroyed, thereby justifying a warrantless search of the area within the arrestee's immediate control. State v. Palmer, 803 P.2d 1249, 1252 (Utah App. 1990), citing State v. Larocco, 794 P.2d 460, 470 (Utah 1990).

The State contends that, "definitionally, if the backpack was within defendant's immediate control, it was also in a place where he could retrieve a weapon or destroy evidence." Br. of Appellee at 8. The State's argument ignores the fact that the evidence seized was removed from the pocket of pants packed inside the backpack. Furthermore, the State's focus on "immediate control" stands on its head the fourth amendment standard articulated by this court in Palmer:

> In Utah, in order to establish exigent circumstances sufficient to justify a warrantless search the State must show either that the procurement of a warrant would have jeopardized the safety of the police officers or the public or that the evidence was likely to have been lost or destroyed.

Palmer, 803 P.2d at 1252.

The State's argument is flawed in its focus on the scope of the warrantless search incident to a lawful arrest to an area within the arrestee's "immediate control" without first meeting its duty to prove that the search was necessary to protect the safety of officers or the public, or to prevent the destruction of evidence.

The court in Palmer states that "the definition of exigent circumstances parallels that stated in United States Supreme Court case law: that an arresting officer may search for and seize any evidence on the arrestee's person and in the area "within his immediate control," in order to prevent its concealment or destruction." This articulation of the standard is one example of what Justice Zimmerman called in his concurring opinion in Hygh the "confusing rationalizations and distinctions" plaguing fourth amendment jurisprudence. An officer's authority to search an area within an arrestee's immediate control in order to prevent the concealment or destruction of evidence is a significantly different standard than one which requires that the state show that evidence was likely to have been lost or destroyed to justify a warrantless search. Nonetheless, this Court determined the definitions to be "parallel."

If, as the State contends, the standard is only that a warrantless search incident to a lawful arrest may be executed in the area of the immediate control of the arrestee, the burden which has been placed upon the State to show that an exigency justifies the warrantless intrusion, i.e., a warrantless search was necessary to protect the safety of police or to prevent the destruction of evidence, is an empty burden to bear.

The Court of Appeals has upheld the warrantless search of a diaper bag incident to a lawful arrest, despite recognition that "the fact that the [detainees] were individually guarded, raises doubt that the diaper bag was in control, in terms of either of them being able to reach into it before officers could intervene." State v. Harrison, relied upon by the State to support its contention that the warrantless search of Appellant's backpack and pants pockets is easily distinguishable from the instant case. 803 P.2d 769 (Utah App. 1991); Br. of Appellee at 6.

In Harrison, the diaper bag was approximately ten feet from the defendant at the time of the arrest. Officer Kortright testified that the Appellant's back pack was fifteen to twenty feet from the Appellant at the time of his arrest. [R. at 116]. Harrison was a suspect in a homicide; Officer Kortright had no reason to believe Appellant was involved in criminal activity, and he admitted that officers were just searching for items that might be used as evidence. [R. at 127]. Harrison was arrested in the company of his wife who was on the scene and who could have obtained a weapon from the diaper bag or could have destroyed evidence; Appellant was alone. Harrison's wife was not arrested and she was allowed to leave with the couple's baby, therefore, any evidence in the diaper bag would have left the scene with her; Again, Appellant was alone and there was absolutely no danger that his backpack or the pants inside the backpack would disappear from the scene. Finally, Harrison's wife consented to the diaper bag's search; Officer Kortright neither sought nor obtained Appellant's consent to search the backpack or pants pockets. The exigencies justifying the warrantless search of the Harrison's diaper bag do not exist

in Appellant's case; therefore, Harrison is not dispositive here. Since the State has failed to meet its burden to show exigent circumstances justifying the warrantless search of Appellant's backpack and pants pockets inside the backpack, the warrantless search was unlawful and evidence seized as a result of the unlawful search should be suppressed.

POINT II

Since Utah law provides adequate protection of Wirth's rights against unreasonable search and seizure, it is not necessary for this court to reach the federal constitutional analysis.

The State suggests that defendant has not developed an argument addressing the distinction between the protections afforded an arrestee under the Utah Constitution and those provided by the federal constitution, therefore, analysis of the warrantless search of Wirth's backpack should proceed under federal law. See Br. of Appellee at 5 fn 1. Appellant has, however, argued that law enforcement officers violated state law governing execution of a warrantless search. See, Br. of Appellant. Insofar as state law provides adequate grounds for this court to decide the issues raised by Appellant, it is not necessary for this court to reach the federal analysis. State v. Bell, 770 P.2d 100 fn3 (Utah 1988).

In Palmer, *supra*, this court articulated Utah law governing warrantless searches under the fourth amendment. "Once the threat that the suspect will injure the officers or will destroy evidence is gone, there is no persuasive reason why the officers cannot take the time to secure a warrant." 803 P.2d at 1252, citing State v. Larocco, 794 P.2d qat 470;

State v. Ashe, 745 P.2d 1255, 1259 (Utah 1987) (where interested party knows police are approaching, exigent circumstances exist to allow warrantless entry of residence to prevent possible destruction of evidence); State v. Christensen, 676 P.2d at 411 (police must have probable cause to believe evidence will be lost if not immediately seized). The requirement that the State prove exigencies justify a warrantless search may be a common requirement to both the federal and state constitutions. Analysis under Utah law, however, requires consideration of the exigencies against a backdrop of the legislature's enactment of Utah Code Annotated 1953 § 77-23-204(2) making police access to judicial approval for a search as simple as dialing the telephone. The ease in which officers can obtain a warrant under the statute leaves little room for any excuse for failing to obtain a warrant once it is determined that the safety of the police or the destruction of evidence are not at issue.

POINT III

The prosecution failed to show that the evidence seized from Appellant's pants pockets would have been discovered in the course of a post arrest inventory.

The State invokes three exigent circumstances in its attempt to justify the warrantless search that culminated in the search of Wirth's pants pockets: the "search incident to a lawful arrest," the "inevitable discovery" rule, and the "inventory search" exception to the warrant requirement. Appellant's position is that the warrantless search of Wirth's personal belongings was not necessary to protect the safety of officers or the public, nor was the warrantless search necessary to avoid the destruction of evidence. Therefore, the

warrantless search conducted by law enforcement officers exceeded the scope of a limited search incident to a lawful arrest and violated the requirement under Utah law that officers obtain a warrant when feasible before conducting a search. Evidence seized in the course of the search of Appellant's back pack and pants pockets is, therefore, tainted and inadmissible unless one or more of the exigencies claimed by the State are sufficient to justify the warrantless search. The State's arguments that the inevitable discovery doctrine and inventory search exception to the warrant requirement are simply not supported by the record.

This court first applied the "inevitable discovery" doctrine in State v. Northrup, 756 P.2d 1288 (Utah App. 1988). The inevitable discovery doctrine states that evidence is admissible if the evidence would inevitably have been discovered without reference to police error or misconduct. Id. at 1295. The inevitable discovery rule

> allows the admission of evidence as long as the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means.

State v. Sampson, 808 P.2d 1100 (Utah App. 1990), (citations omitted). The prosecution must show that the evidence *would* have been discovered, not simply that it *could* or *might* have been discovered. Id., (citations omitted).

In Northrup, the defendant appealed his conviction on distribution and possession of controlled substances charges on grounds that evidence seized in a pat-down search of the defendant was inadmissible. The State argued that the evidence was admissible under the "inevitable discovery" doctrine, but the record contained insufficient evidence to

support the contention. An appellate court cannot properly determine the outcome of a fact-sensitive issue where the record below is not clear and uncontroverted, or capable of only one finding. Palmer, 803 P.2d at 1253. Search and seizure issues are highly fact sensitive. Id.; See also, State v. Harrison, 805 P.2d 769, 784 fn26 (Utah App. 1991) (approval of practice in other jurisdictions of requiring specific fact findings to support trial court's decision on motion to suppress. Failure to enter such findings is reversible error unless the facts in the record "are clear, uncontroverted, and capable of supporting only one finding in favor of judgment"). This court in Northrup refused to speculate on the "unknown possibilit[y]" that evidence seized in a pat-down search would have inevitably been discovered without the illegal police entry into the defendant's home and accordingly held that the evidence so obtained should have been excluded. Northrup, 756 P.2d at 1295.

Like Northrup, the State here hypothesizes that discovery of the controlled substances in Wirth's pants pockets was inevitable as officers would have found the drugs in the course of the inventory search that most certainly would have taken place concurrent with Wirth's booking at the jail. Contrary to the State's assertion that ample evidence exists to support the contention, the search conducted by officers in the parking lot cannot be construed to be an inventory search conducted in the course of the arrest procedure. Officer Kortright testified at Appellant's suppression hearing that officers were searching for evidence. [R. 127]. The search was, by the officer's admission, investigatory. The inventory exception does not apply to a search with an investigatory police motive. See, State v. Hygh, 711 P.2d 264 (Utah 1985).

In addition, the prosecution failed to show that an inventory of Appellant's property was conducted in the course of post arrest procedures. There was no evidence that officers made a complete and accurate list of Appellant's property either right after his arrest or when he was booked into the jail beyond Officer Kortright's mere assertion that such a list would have been made. There was no evidence that a list of Appellant's property was made upon receipt of the backpack into the evidence room. There was no evidence of the procedures routinely followed by officers to conduct such an inventory during the course of booking an arrestee into the jail. There was no evidence presented at the suppression hearing of the statutory authority for conducting an inventory of the Appellant's personal property. There was no evidence that the Clearfield Police Department had a policy for conducting an inventory of Appellant's personal property. Like Northrup, therefore, the record lacks the factual basis to show by a preponderance of the evidence that the seized evidence would have been inevitably discovered. Furthermore, the district court specifically found that the search in the case at hand was not an inventory search:

> The Court does not find that this is an inventory search. First of all, the theory behind inventory searches is basically it's done to protect the agency from civil liability for items which may have been confiscated and later found to be missing. Any inventory search that the officers conduct, in this particular case, if that's their policy, does not meet that rationale. What may have been of value in their estimation may not be in the defendant's or vice verse. So I don't think this case can be argued on the basis of an inventory search. [R at 154-5].

Given the court's finding the State cannot avail itself of the doctrine of inevitable discovery; therefore, the evidence should have been excluded as fruits of an illegal search.

CONCLUSION

Based upon the foregoing, Appellant respectfully requests that this Court find the search of Appellant's backpack and pants pockets was unlawful and that the evidence seized as a result of the search should have been suppressed.

DATED this 28 day of June, 1995.

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CERTIFICATE OF SERVICE/MAILING

I hereby certify that on this 21 day of June, 1995, the foregoing REPLY BRIEF OF APPELLANT AND REQUEST FOR ORAL ARGUMENT was served/mailed in the manner indicated below upon the following:

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